# UT Securities Sdn Bhd v Lee Hor Sai

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–341 OF 1997
KAMALANATHAN RATNAM J
22 OCTOBER 2004

*Securities — Shares — Claim for contra losses — Dispute on total amount outstanding — No notice of interest charged on amount owing — Whether claim proved*

The plaintiff claimed, inter alia, for contra losses incurred by the defendant in the sum of RM489,237.87 including interest at the rate of 12% per annum as at 31 August 1997. The defendant disputed the total amount of outstanding contra losses due and owing. He claimed that full particulars of his contra losses and gains were not furnished to him to enable him to ascertain the actual outstanding contra losses due and owing to the plaintiff. He also claimed he was not aware that a 12% interest charge would be imposed on all amounts of outstanding contra losses.

**Held**, allowing the plaintiff's claim:

(1) In the light of the blatant discrepancies in the defendant's evidence, the court accepted the evidence of the plaintiff rather than the defendant's evidence as to the explanation relating to the summary of contra losses (see para 6).

(2) The defendant's attempt to show that there were discrepancies and mistakes in the summary of contra losses had been sufficiently clarified under cross-examination of the PW1 (see paras 7 and 8).

(3) The defendant was precluded and estopped from raising the issue of non-receipt of the contra loss statements as it was not pleaded in his defence. Also the contra statements for the years 1993 and 1994 were not relevant to verify the outstanding amounts owed to the plaintiff since the first contra loss claim made by the plaintiff in the claim was on 28February 1995 (see para 9).

(4) The defendant's failure to reply to the letter from the KLSE dated 26July 1997 with regard to the amount due and owing to the plaintiff also showed that he had no plausible or tenable arguments in response to the allegations of contra loss due (see para 10).

(5) Interest at the rate of 12% per annum was clearly stated in the contra loss statement. In addition, PW1 had testified that through out his dealings with the defendant, he had informed the defendant orally of the interest charges as stipulated in the contra loss statements sent out to the defendant (see paras 11 and 12).

[**Bahasa Malaysia summary**

Plaintif telah menuntut, inter alia, untuk kerugian kontra yang dialami oleh defendan berjumlah RM489,237.87 termasuk faedah pada kadar 12% setahun mulai 31 Ogos 1997. Defendan telah mempertikaikan jumlah kerugian kontra yang perlu dibayar dan terhutang. Beliau menuntut bahawa butiran penuh kerugian kontra dan keuntungan tidak diberikan kepadanya bagi membolehkan beliau memastikan kerugian kontra sebenarnya yang terhutang dan perlu dibayar kepada plaintif. Beliau juga menuntut bahawa beliau tidak mengetahui bahawa kadar faedah sebanyak 12% akan dikenakan atas jumlah kerugian kontra tertunggak.

**Diputuskan**, membenarkan tuntutan plaintif:

(1) Memandangkan terdapat percanggahan yang jelas dalam keterangan defendan, mahkamah telah menerima keterangan plaintif dan bukannya keterangan defendan mengenai penjelasan berkaitan dengan keterangan ringkasan kerugian kontra (lihat perenggan 6)

(2) Cubaan defendan untuk menunjukkan percanggahan dan kesalahan dalam ringkasan kerugian kontra telah pun dijelaskan di bawah pemeriksaan balas PW1 (lihat perenggan 7 dan 8).

(3) Defendan telah dihalang daripada membangkitkan isu ketidakterimaan penyata kerugian kontra kerana ia tidak dirayu dalam pembelaannya. Tambahan pula, penyata kontra bagi tahun 1993 dan 1994 tidak berkaitan bagi mengesahkan jumlah tertunggak yang terhutang kepada plaintif kerana tuntutan pertama kerugian kontra tertunggak dibuat oleh plaintif adalah pada 28 Februari 1995 (lihat perenggan 9). Kegagalan defendan untuk membalas surat dari KLSE bertarikh 26 Julai 1997 mengenai jumlah yang perlu dibayar dan terhutang kepada plaintif juga menunjukkan yang beliau tiada alasan yang munasabah dan boleh dipertahankan untuk membantah tuduhan bagi kerugian kontra yang perlu dibayar (lihat perenggan 10).

(4) Kadar faedah 12% setahun telah jelas dinyatakan di dalam penyata kerugian kontra. Tambahan pula, PW1 telah memberi keterangan bahawa sepanjang beliau berurusan dengan defendan, beliau telah memberitahu defendan secara lisan mengenai kadar faedah yang ditetapkan seperti dalam penyata kerugian kontra yang telah diserahkan kepaya defendan (lihat perenggan 11 dan 12).]

**Notes**

For cases on sale of shares, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 902–913

*JChan (Shearn Delamore & Co)* for the plaintiff.

*KKumarathiraviam (RNethaji Rayer & Co)* for the defendant.

**Kamalanathan Ratnam J**:

THE PLAINTIFF'S CASE

**[1]** The plaintiff's claim is for contra losses incurred by the defendant in the sum of RM489,237.87 including interest thereon at the rate of 12% per annum as at 31 August 1997. In addition, the plaintiff claimed against the defendant, interest at the rate of 12% or alternatively 8% per annum on the principal contra loss sum of RM384,521.99 from 1 September 1997 until the date of full settlement.

THE DEFENCE

**[2]** The defendant disputed the total amount of outstanding contra losses due and owing. He claimed that full particulars of his contra losses and gains were not furnished to him to enable him to ascertain the actual outstanding contra losses due and owing to the plaintiff. He also claimed he was not aware that a 12% interest charge would be imposed on all outstanding contra loss amounts.

FINDINGS OF THE COURT

**[3]** According to the evidence of PW1 (the dealer's representative) and the evidence of Mohd Iskandar (PW2) the plaintiff's assistant manager of the credit control department, the trading position of the defendant as at 31 August 1997 was RM489,237.87 being the outstanding contra losses incurred by the defendant including interest at the rate of 12% thereon as at 31 August 1997. A tabulation was prepared by PW2 for the court's reference setting out the total principal contra loss amounts together with the chargeable interest which are due and owing to the plaintiff from the defendant as at 31 August 1997. PW1 and PW2 had referred to the outstanding position inquiry listing reports and the relevant contra loss statements to ascertain the defendant's trading position as at 31 August 1997. The plaintiff produced all the contra loss statements to justify its claim against the defendant.

**[4]** The defendant relied on the summary of contra losses prepared by PW1 to support his contention that the said sum of RM489,237.87 was inaccurate. He contended that the total outstanding contra losses due and owing to the plaintiff as at 2 December 1996 was only in the sum of RM48,704.50 as stated in the said summary. However according to PW1, the summary of contra losses in the sum of RM48,704.50 was only in respect of some specific counters, namely Emico, LKT, Farlim and S Plas which were transacted between 16 September 1996 to 27 November 1996. PW1 informed the court that the defendant had informed him that he needed the said summary setting out the particulars of contra losses in respect of the said counters which the defendant had transacted on behalf of his business associate

and that he needed to recover the contra losses from his business associate. The defendant however, in evidence stated that he had asked PW1 to provide him with an amended statement of account after receiving the plaintiff's letter dated 2 December 1996 claiming the sum of RM328,735.61 in respect of outstanding contra losses but PW1 strenuously denied this.

**[5]** It is pertinent to point out at this juncture that the credibility of the defendant is questionable as it was apparent, during cross-examination, that there were various discrepancies in his evidence in chief and inaccuracies in his version of events. The defendant admitted that he had only started trading after 23 November 1993 and not in early 1992 as stated in his evidence in chief. The defendant also admitted that the evidence in his witness statement that he had started incurring losses in early 1993 was incorrect and untrue as he had only started trading after 23 November 1993. The defendant, when cross-examined had also admitted that the first letter of demand from the plaintiff was the plaintiff's solicitors' letter dated 26 April 1995 and not the plaintiff's letter dated 2 December 1996 as stated in his evidence in chief.

**[6]** In the light of the blatant discrepancies in the defendant's evidence, Iaccept the evidence of PW1 rather than the defendant's evidence as to explanation relating to the summary of contra losses. The defendant endeavoured to show that there were discrepancies and mistakes in the said summary of contra losses which would cast doubt on the plaintiff's claim. The defendant referred to item 2 of the said summary of contra losses and pointed out that the purchase price of the counter referred to was RM20.30 and that the selling price was RM25.25 and suggested that the result should be a contra gain instead of a contra loss. However PW1 had clarified under cross-examination that he had made a mistake and that the purchase price of RM20.30 should have been RM25.75 instead.

**[7]** Counsel for the defendant also referred to item 8 of the said summary of contra losses and pointed out that the purchase price of the counter referred as RM18.70 and the selling price as RM19.20 and had suggested that the contra gain value stated in the summary as RM675.31 was incorrect as it should be in the sum of RM5,000. However, PW1 in re-examination had explained that there were transaction costs for the purchase and sale of shares, i.e. 1% brokerage fee, 0.1% stamp duty charges and a clearing fee of 0.05% which are to be imposed on the purchase and sale contract value which all in all would translate to the amount of roughly RM4,300. Hence, the nett contra gain of RM675.31 was correct.

**[8]** The defendant had also relied on the payment of four cheques in the aggregate sum of RM185,000 in an attempt to challenge the sum of RM489,237.87 claimed by the plaintiff. The defendant in his evidence suggested that the said four payments in the aggregate sum of RM185,000 were not offset against the defendant's outstanding contra losses. According to PW1 and PW2, the said

four payments in the aggregate sum of RM185,000 were meant for settlement of contra losses which were not connected or relevant to the plaintiff's claim as confirmed by cross reference to the contra loss reference numbers stated in the receipts and the contra loss reference numbers in the 'Total Outstanding Contra Losses as at 31 August 1997'. PW1 in re-examination had confirmed that the contra losses for which the said four payments were meant were not included in the plaintiff's claim herein by referring to the said receipts and the 'Total Outstanding Contra Losses as at 31 August 1997'. I therefore reject the defence submission on the four payments amounting to RM185,000.

**[9]** It is my judgment that the defendant is precluded and estopped from raising the issue of non-receipt of the contra loss statements as the defendant had not pleaded in his defence that he did not receive the said contra loss statements. The defendant contended that as he was not sent the contra statements for the years 1993 and 1994 as requested by his solicitors' letters, he was unable to verify the actual outstanding contra losses owed by him to the plaintiff. It is my judgment that the contra statements for the year 1993 and 1994 are not relevant for the defendant to verify the outstanding amounts owed by the defendant to the plaintiff since the first contra loss claim made by the plaintiff in the claim herein is on 28 February 1995. In any case the defendant did not reply to the plaintiff's notice of demand dated 11 August 1997. The defendant also did not reply to the letter from the KLSE dated 26July 1997 which gave the defendant fourteen (14) days to give his explanation of the alleged sum stated therein as due and owing to the plaintiff. Neither did the defendant bother to respond to the KLSE's letter of 16 February 1998 informing the defendant that he would be placed in the defaulters' list which list would be circulated to all member companies, yet he choose to remain silent and not respond to the allegations made out in the KLSE's letter of 26July 1998 and choose to remain as a defaulter of the KLSE for the past seven years and not being able to transact shares when he could have responded to the KLSE as he was entitled to.

**[10]** It is my judgment that no reasonable businessman such as the defendant would choose not to respond to allegations made by the plaintiff and particularly the KLSE unless he had no plausible or tenable arguments in response to the said allegations.

**[11]** The defendant claimed that he was not aware that interest at the rate of 12% per annum would be imposed on all outstanding contra loss sums due and owing to the plaintiff and in the circumstances, does not agree to such interest being imposed. According to PW1 and PW2, it is clearly stated in the contra loss statements that interest at the rate of 12% per annum would be charged on the contra loss sums should payment not be made within the period specified, ie fourteen (14) days upon receipt of contra loss statements for shares transacted on the main board of the KLSE and four (4) days upon receipt of contra loss statements for shares transacted on the second board of the KLSE.

**[12]** In addition, PW1 had testified that through out his dealings with the defendant, he had informed the defendant orally of the said interest charges as stipulated in the contra loss statements sent out to the defendant. According to PW1 it is common policy for all stock brokering companies to charge interest on overdue contra loss amounts which their clients had failed and/or refused to settle.

**[13]** The defendant had also taken issue with the additional interest charged in the sum of RM47,468.19 as claimed by the plaintiff. PW2, in cross-examination had clearly explained that the additional claim for interest in the said sum of RM47,468.19 is the interest charged in respect of principal contra losses which already have been fully settled and which did not form part of the plaintiff's claim herein.

**[14]** I therefore enter judgment for the plaintiff

(a) for RM441,559.70;

(b) interest to run from 1 September 1997 on RM384,521.99 being the principal sum at 10% interest per annum and continuing (which is the agreed interest less RM47,678.19 that has been dropped);

(c) costs.

*Plaintiff's claim allowed.*

Reported by Loo Lai Mee